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No.

88 - 324

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

Kenneth Hastings, Petitioner

v.

United States, Respondent

SUPPLEMENTAL BRIEF TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PURPOSE OF SUPPLEMENTAL BRIEF

The purpose of this brief is to call the Court's attention to the fact that the pending indictment, No. 87-0058-F, was dismissed without prejudice by the government on August 30, 1988. Also, the petitioner argues that an important actual controversy still exists, although the pending indictment has been dismissed.

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STATEMENT OF SUPPLEMENTAL FACTS

This brief by Kenneth Hastings supplements his petition for writ of certiorari filed and served on August 19, 1988.

BACKGROUND INFORMATION

Hastings is a criminal defendant whose case was dismissed by the Chief Judge of the United States District Court of

Massachusetts on Speedy Trial Act grounds. Originally, the indictment (no. 86-0419) was dismissed without prejudice on March 5, 1987. The jury had been impaneled but not sworn. As of March 5th, Hastings had been incarcerated for 106 days. He had been detained without bail, solely for the purpose of awaiting trial in this case. 18 U.S.C. §3142(e); 18 U.S.C. §3164. Once the dismissal occurred, he was released.

After dismissal, the government reindicted Hastings for the same offenses in indictment no. 87-0058-F. Then, because of a newly discovered pattern of governmental misconduct and bad faith, the district court reconsidered, and dismissed the original indictment with prejudice. Consequently, the second indictment (no. 87-0058-F) was also barred. On the government's appeal, a divided panel of the First Circuit reversed and reinstated

indictment no. 87-0058-F. Hastings then petitioned to this Court on August 19, 1988.

NEW DEVELOPMENT

On August 30, 1988, ten days after service of his petition, without Hastings' consent, the government dismissed indictment 87-0058-F pursuant to Fed. R. Crim. Pro. 48(a). (A copy of the dismissal is appended hereto, p. 1a. Hastings does not seek review of this dismissal.) As of the time of the dismissal, pretrial discovery and pretrial motions were still pending.

The express reason for the Rule 48(a) dismissal was that "the defendant is being prosecuted by other authorities for the same offenses." The "other authorities" refers to the Commonwealth of Massachusetts which indicted Hastings in November of 1987, indictment nos. 87-5985 through 5994. However, Hastings has never been

arraigned on the state charges and did not know of their existence until August 31, 1988 when he received the Notice of Rule 48(a) dismissal.

DISCUSSION

An actual controversy remains despite the Rule 48(a) dismissal, and the important reasons for granting the petition still exist.

In all cases, a case or controversy exists, for purposes of testing mootness, where legal consequences are unresolved. E.g., United States v. Concentrated Phosphate Export Association, 393 U.S. 199, 203 (1968); Church of Scientology v. United States, 485 F.2d 313, 316 (9th Cir. 1973); St. Pierre v. United States, 319 U.S. 41, 43 (1943). In criminal cases, because of practical collateral consequences, a controversy still exists, although a petitioner may have discharged his sentence before review in this Court. Sibron v. New

York, 392 U.S. 40, 57, 58 (1968).

In the instant case, Hastings has been accused of violations of criminal laws in both United States District of Massachusetts and in the Commonwealth of Massachusetts. He has not been convicted of any charges in either jurisdiction. While there has been no conviction, important practical and legal consequences remain to be resolved by this Court.

The legal consequences flow from the fact a Rule 48(a) dismissal does not constitute a final judgment. See, Rule 48(a) Fed. R. Crim. Pro.; United States v. Del Vecchio, 707 F.2d 1214, 1216 (11th Cir. 1983) (where the government was free to seek a superceding indictment after a Rule 48(a) dismissal.) In the present context, the lack of finality has two consequences. First, the United States is free to reindict Hastings for a third time on the

same charges. Were this to occur, Hastings would have no forum in which to raise the issues presented in his petition to this Court.

The second consequence relates to the indictments pending in the Commonwealth of Massachusetts. Although there is no double jeopardy issue, Massachusetts treats dismissals on statutory speedy trial grounds as barring all future prosecutions for the same offenses. Commonwealth v. Fields, 371 Mass. 274, 282 (1976); Commonwealth v. Ludwig, 370 Mass. 31, 34 (1976). (both cases citing M.G.L. ch. 176 §72, repealed and replaced by Mass. R. Crim. Pro. 36.); Commonwealth v. Balliro, 385 Mass. 618, 620 (1982) (holding that mandatory dismissals under Mass. R. Crim. Pro. 36 also bar subsequent indictments.) Therefore, were the relief Hastings seeks in this Court to be granted, it is likely

that the state prosecution would also be terminated.[1]

In addition to the immediate legal consequences, Hastings suffers practical consequences if the status of his federal prosecution remains unsettled. Hastings himself lives with his parents in a small community and works as a machinist in a local business. He has had no convictions, and other than the current, unresolved accusations against him, he is a citizen in good standing. The mere fact of unresolved accusations and the potential for

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[1] Massachusetts has not decided a case where a federal prosecution was dismissed on Speedy Trial Act grounds. However, the policy reasons for dismissal would require dismissal for a case in this posture. See, Commonwealth v. Fields, 371 Mass. 274, 282 (1976); Commonwealth v. Ludwig, 370 Mass. 31, 34 (1976); Commonwealth v. Balliro, 385 Mass. 618, 620 (1982). These policy reasons would apply especially where, as here, the original investigation and arrest was a joint state and federal enterprise.

reindictment are damaging to his reputation and interfere with his future business plans. See, Sibron v. New York, supra. (regarding practical harm of a conviction).

In this case, there are undesirable legal and practical consequences which would be resolved, if this Court were to grant the relief requested in the petition. See, United States v. Concentrated Phosphate Export Association, supra, (where the mootness was tested by comparing relief requested with present status of the case).

Finally, the issues presented in the petition include important matters concerning statutory interpretation of the Speedy Trial Act and the role of the lower courts in enforcing the Act. The government should not be allowed to obtain a precedent in the court of appeals which

gives prosecutors freedom to act unlawfully and then be able to preserve that precedent by avoiding review in this Court.[2]

In the event this Court decides not to fully review the court of appeals decision, an appropriate action in this case may be to vacate the court of appeals' decision. See, United States v. Munsingwear, 340 U.S. 36, 39 (1950) (approving of the practice of vacating certain decisions below where the case became moot on its way to the United States Supreme Court.)

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[2] If the reasons for dismissal were truly related to the pending indictment in state court, the United States could have dismissed under Rule 48(a) prior to the decision in the court of appeals. Since the state indictments have been pending for over nine months (since November of 1987) without any activity, the Petite policy does not seem to explain the decision to dismiss this federal indictment.

CONCLUSION

Although the pending federal indictment has been dismissed, the actual controversy remains alive and the issues presented remain worthy for consideration by this Court.

Respectfully submitted

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO.
	)	87-0058-F
KENNETH HASTINGS	)	

DISMISSAL

Now comes Frank L. McNamara, Jr., United States Attorney for the District of Massachusetts, and, pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, hereby dismisses the above-captioned Indictment charging in the following violations: four counts charging violations of Title 21, United States Code, Section 841(a)(1) (distribution of cocaine and methamphetamine); two counts charging violations of Title 21, United States Code, Section 841(a)(1) (possession with intent to distribute methamphetamine and cocaine) and one count charging a violation of Title 18, United States Code, Section 924(c)

(carrying firearm during commission of felony). As reason therefore, the United States notes that the defendant is being prosecuted by other authorities for the same offenses.

Respectfully submitted,

FRANK L. McNAMARA, JR.
United States Attorney

Leave to file granted:

_____
Frank H. Freedman
Chief United States District Judge

Date: August 30, 1988

Federal Rules of Criminal Procedures

RULE 48 DISMISSAL

(a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.